

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FFHOENIX CUIVRE, L.L.C.,

Plaintiff,

vs.

Civ. No. 01-1190 JP/KBM

LESMO MACHINERY AMERICA, INC.,

Defendant.


MEMORANDUM OPINION AND ORDER

On February 19, 2002, the Defendant filed Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted or, in the Alternative, Motion for Partial Summary Judgment on Count I (Doc. No. 10). This motion was directed at the Plaintiff's delivery claim found in Count I of the Complaint. In addition to responding to the Defendant's motion, the Plaintiff filed a Motion to File an Amended Complaint (Doc. No. 15). The Plaintiff's motion to amend sought to clarify the delivery claim. By agreement of the parties, the Court granted the Plaintiff's motion to amend the Complaint. Order (Doc. No. 33), filed March 26, 2002. The Plaintiff filed its Amended Complaint on April 3, 2002 (Doc. No. 35).

Before the Plaintiff filed the Amended Complaint, the Defendant argued in its reply brief that the motion to dismiss, or in the alternative, motion for summary judgment should be granted even as to the proposed amended delivery claim. Those arguments were premature since the amended complaint had not yet been filed. Moreover, the Plaintiff has not had an opportunity to respond to those new arguments. For these reasons, I will deny the Defendant's motion at this time. The Defendant may, of course, renew its motion to dismiss, or in the alternative, motion for

summary judgment.

IT IS ORDERED that Defendant's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted or, in the Alternative, Motion for Partial Summary Judgment on Count I (Doc. No. 10) is denied.


CHIEF UNITED STATES DISTRICT JUDGE